

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

THE MEAD CORPORATION,
FINE PAPER DIVISION

and

Case 9-CA-38055

JAMES MCBRAYER, AN INDIVIDUAL

Naima Clarke, Esq.,
for the General Counsel.
Robert J. Brown, Esq.,
(*Thompson, Hine & Flory*),
of Dayton, Ohio, for the Respondent.

DECISION

Statement of the Case

KARL H. BUSCHMANN, Administrative Law Judge. This case was tried in Chillicothe, Ohio, on April 17, 2001, upon a complaint dated January 9, 2001, alleging that the Respondent, The Mead Corporation ("Mead") violated Section 8(a)(1) of the National Labor Relations Act, 29 U.S.C. § 157, ("the Act"). James McBrayer filed the underlying charge on November 8, 2000, alleging that Mead denied McBrayer and another employee, Jerry McDonald, access to solicit union materials on their off duty time in a nonworking area.

The Respondent's answer admits the jurisdictional aspects of the complaint and denies the commission of any unfair labor practices. Respondent contends that the materials distributed by McBrayer were political in nature and not protected by the Act.

Based on my observation of the witnesses and my consideration of the entire record and the briefs of the parties, I make the following

Findings of Fact

I. Jurisdiction

Mead operates a fine paper mill in Chillicothe, Ohio. In the twelve months prior to the initiation of this complaint, Mead sold and shipped from the mill goods valued in excess of \$50,000 directly to points outside the State of Ohio. The Respondent is admittedly an employer within the meaning of Section 2(2), (6) and (7) of the Act.

II. The Facts

Mead's mill is divided into two divisions: Chillicothe and Chilpaco. The Chillicothe division makes fine paper and its employees are members of the Paper, Allied Industrial,

Chemical and Energy Workers International Union, or PACE Local 5-731 union. The Chilpaco division, which is the facility in issue, makes coating side paper and PACE Local 5-988 represents its employees. Each mill has a separate collective bargaining agreement with Mead. Members of both local unions representing Mead employees are required to pay dues because Mead is a closed shop.

James McBrayer, an employee of Mead since 1961, is a shop steward at the Chillicothe mill. On November 3, 2000, four days before the presidential election, McBrayer and Jerry McDonald, a retired employee of Mead, distributed handbills on Mead's property in a nonworking area just outside the security turn styles leading to the Chilpaco mill.¹ At the time of the distribution, both men were not on the clock or scheduled to be at work.

The handbill distributed by McBrayer is a one page document. The top half of the page, in predominant color and font, the handbill states (G.C. Exh. 2):

AL GORE DOESN'T WANT TO TAKE AWAY YOUR GUN, BUT GEORGE W. BUSH WANTS TO TAKE AWAY YOUR UNION

The bottom half of the flyer lists six newspaper editorials pertaining to George W. Bush's stance on issues affecting labor: "right to work," overtime pay, minimum wage, prevailing wage, pension plans, and privatization of government jobs. The bottom of the flyer, also in the large font, reads: "DEFEND UNIONS. DEFEAT BUSH. VOTE NOVEMBER 7." The handbills bore the insignia of *Labor 2000* in the bottom left hand corner. *Labor 2000* was a nationwide effort to mobilize the labor vote and educate employees on the right way to vote.

McBrayer distributed handbills for about ten minutes before Security Guard April Stevens approached him. Stevens told McBrayer he would have to cease distribution or leave the company property. McBrayer explained that the handbills were union material and that he was protected in distributing it to employees. McBrayer refused to leave, so Stevens called Security Officer Terry Russell to the area. Russell also received a call from Lovenshimer (or Lovenshine), a manager at Mead. Lovenshimer asked Russell to have McBrayer and McDonald leave the property. Russell arrived at the gate where McBrayer was distributing the handbills. By Russell's assessment, the handbill was political in nature, he accordingly asked them to leave Mead property.² McBrayer explained that the union had distributed similar material before and that he may get the International [union] involved. But McBrayer complied with the request and left Mead's property.

Mead's past practice was to prohibit the distribution of political campaign literature on company property.

After the incident, McBrayer filed a charge with the NLRB because he felt that the Company had interfered with his protected activity in violation of his Section 7 rights. He

¹ On many occasions before this litigation, McBrayer had distributed union materials on Mead's property on his time off or on nonworking time. Mead never prohibited those distributions. A few days before this incident, McBrayer had been asked to leave Mead's property in front of the Chillicothe mill. No action was taken because McBrayer had in fact been on public property.

² Russell's description of the handbill was vague, but he did testify that the handbill was associated with the election, candidates' names were on the page, and timing was close to the election.

explained the reasons for filing the charge, namely that he should have the right to do that if he so chose, and that he was a volunteer for *Labor 2000*. The Union did not join McBrayer in this litigation.

5

Analysis

Section 7 of the Act guarantees employees the right to engage in concerted activities for the employees' mutual aid and protection, such as the distribution of union material so long as it is done in a nonworking area and during nonworking times; an employer violates Section 8(a)(1) by interfering or prohibiting such a distribution. See *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945).

In order for the distribution of union literature to fall within the purview of the "mutual aid and protection" clause of Section 7, the content must be "pertinent to a matter which is encompassed in Section 7." *McDonnell Douglas Corp.*, 210 NLRB 280, 283-84 (1973). This is not to say that such protection is limited to those subjects directly related to the employment relationship, rather the scope of the "mutual aid and protection" clause is interpreted broadly. The clause affords employees wide latitude in distributing information concerning employees so long as the subject of their activity can fairly be said to "bear a relationship to their interests as employees." See *Eastex v. NLRB*, 437 U.S. 556, 565-66 (1978) (holding that the union material urging "appeals to legislators" was protected by Section 7); see also *Samsonite Corp.*, 206 NLRB 343, 346 (1973) (holding a newsletter containing gratuitous remarks or social commentary did not detract from the purpose of the seeking improvements in working condition, thus the entirety of the newsletter is protected).

25

In *Eastex*, the Supreme Court cautioned that the holding was fact specific and that the relationship between the literature and the employees' interests as employees could become so attenuated as to be deemed outside the scope of the "mutual aid and protection" clause. *Supra*, at 568. Specifically, the Court opined "that there may well be types of conduct or speech that are so purely political or so remotely connected to the concerns of employees as employees" that it falls outside the protection of Section 7. *Eastex*, 324 NLRB at 570 fn. 20. In those instances, the Court will defer to the National Labor Relations Board ("the Board") for determinations as to what conduct and speech are protected. See *id.* at 568 fn. 18.

35

In three leading cases, it has been decided what types of political literature distributions fall under the umbrella of Section 7. In *Eastex*, the Supreme Court held that Section 7 protected employees in the distribution of a newsletter which extolled the benefits of union membership, urged employees to contact their congressmen concerning "right to vote" legislation, and criticized the presidential veto of a minimum wage increase. See *id.* at 565-566.

40

Similarly, the Board found a two-page newsletter to be protected by Section 7, where the front page was devoted to the issue of forced overtime and the second page detailed political matters, such as the economic situation at the country, the role of union leaders in politics, and a call for a national labor party. See *Ford Motor Co.*, 221 NLRB 663, 666 (1975). On the other hand, the Board did not extent the protection of the "mutual aid and protection" clause to a newsletter attacking the union's policy of endorsing major party candidates in congressional elections, urging employees to vote for an independent labor party, and referring to the Watergate scandal and certain economic issues. *Ibid.* The Board noted that the "mixed material" analysis in *Samsonite*, *supra*, was not controlling in this case, because "the election of any political candidate may have an ultimate effect on employment conditions, [but it is] sufficiently removed so as to warrant an employer to prohibit distribution on its property of material solely concerned with a political election."

45

Last, the Board concluded that leaflets were purely political tracts undeserving of Section 7 protection when such literature related to an election, supported particular candidates, and the content could not be found to relate to the employee's problems and concerns as employees. *Firestone Steel Prod. Co.*, 244 NLRB 826, 826-27 (1979).

The distribution and content of the handbills in this case most closely resembles the type of literature, which is not within the purview of Section 7 protection. First, the handbill explicitly urges employees not to vote for George W. Bush when it reads "Defeat Bush" because he "Wants to Take Away Your Union." Moreover, the handbill implicitly advocates voting for Al Gore by explaining his position on gun control. In *Ford Motor* and *Firestone*, the Board found that the distributed literature that expressly suggested employees vote for or against a certain party or candidate fell outside the rubric of protected activity. In contrast, the literature the Board held to be protected in *Eastex* and *Ford Motor* did not expressly call for employees to give or withdraw support for a particular candidate or party.

Second, the handbill does not fall within *Eastex's* requirement that the content "bear a relationship to [employees] interests as employees." Although there is a presumption of validity of union literature being distributed to employees, and even though the umbrella of protection under Section 7 covers a vast array of topics, the Board specifically noted in *Firestone* that the outcome of political elections are so attenuated from the employment context so as to justify an employer's prohibition of such material. The General Counsel correctly points out that the handbill addresses issues relevant to labor, such as the minimum wage, "right to work," and pensions and is therefore not purely political. Although the issues mentioned in the handbill are relevant to labor, the primary goal of the handbill was to affect the outcome of a political election. The handbill was distributed three days before the presidential election. The handbill was published by a political action committee in order to support labor's position in the election. In addition to asserting that Bush would take away the union, the other prominent portion of the handbill addresses Gore's gun control policy.

Clearly, the dominant theme of the handbill at issue is a political one. In agreement with the Respondent, I find that the purpose of the handbill was to persuade employees to cast their ballot for Al Gore and that this type of political literature is not protected by Section 7 because the outcome of an election is only remotely related to an employee's interest as an employee.

Conclusions of Law

1. The Respondent, Mead Corporation, is an employer engaged in commerce within the meaning of Section (2), (6), and (7) of the Act.

2. The Respondent did not violate Section 8(a)(1) when it prohibited employees from distributing purely political handbills on Respondent's property at non work location during non work location during non work time.

On these findings of fact and conclusions of law and the entire record, I issue the following recommended³

³ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

ORDER

The complaint is dismissed.

5 Dated, Washington, D.C. June 20, 2001.

10

Karl H. Buschmann
Administrative Law Judge

15

20

25

30

35

40

45